Auguſt 24. 1765.

ANSWERS

FOR

Helen Blackwell, Executrix of the deceaſed Dr *John Johnſton* Profeſſor of Medicine in the Univerſity of *Glaſgow*, her Uncle;

TO

The PETITION of *Robert Blackwell*.

THE point at iſſue between the petitioner as heir, and the reſpondent as executrix of the deceaſed Dr *John Johnſton* profeſſor of medicine in the college of *Glaſgow*, under the deeds of ſettlement in their reſpective favours, to be hereafter more particularly ſtated, reſolves in this ſingle queſtion, Whether the ſum of 6000 merks, contained in a bond of proviſion, granted by Dr *Johnſton* to his niece, *Chriſtian Hay*, and the lawful iſſue of her body, ſo qualified as not to be aſſignable but by contract of marriage, and, in that event, to return to the Doctor's heir, (that is, the petitioner himſelf), is a burden upon the Doctor's heritable eſtate, and, as ſuch, payable by the petitioner; or, *e contra*, if it is a burden upon the executry, and, as ſuch, payable by the reſpondent?

The Lord Ordinary, by repeated interlocutors, has found it to be a burden upon the heritage, upon this uncontrovertible principle, That in every queſtion of this kind, reſpecting the relief between the different kinds of heirs, or between the

heir and executor, the *voluntas teſtatoris* is the governing rule; and when the deeds of ſettlement executed by the Doctor, are fairly conſidered, ſhe flatters herſelf your Lordſhips will be of opinion with the Lord Ordinary, that it was the Doctor's fixed and determined purpoſe, that this ſum ſhould remain a burden upon his heritable eſtate, without relief from the executry.

The reſpondent's caſe would be very unfortunate was this queſtion to be given againſt her. Her huſband's untimely death left her very meanly provided, with the burden of ſeveral young children, for whoſe aliment and education ſhe was obliged to give down a conſiderable part of her ſmall annuity, truſting to the reverſion ſhe had reaſon to expect out of the Doctor's executry, notwithſtanding the many deeds impetrated from him in the laſt ſtage of life, when in dotage, in favours of his ſervant-maid and others, which, as they have been ſuſtained by judgments of the Lord Ordinary in this proceſs of multiple-poinding, will ſo far exhauſt the whole executry, (as appears from a ſtate of the Doctor's funds, and burdens affecting the ſame, hereto annexed), that, if this ſum of 6000 merks is alſo thrown upon her, the whole executry will be over-exhauſted in the ſum of *L.* 250 *Sterling*. If the law ſtands againſt her, there is no help for it, ſhe muſt ſubmit; however apparent it muſt be, that nothing could be more adverſe to the Doctor's favourable intentions towards her, his favourite niece, who would thus be ſtripped of all he intended for her, whilſt the other legatees, though leſs favoured, reap and enjoy the full gratuities conferred upon them.

Thus, in particular, it was, that, when the Doctor made the firſt ſettlement of his land-eſtate, he granted to the reſpondent a bond of proviſion for no leſs a ſum than *L.* 1000 *Sterling*, which he afterwards deſtroyed; when in the view of bettering her circumſtances, he appointed her his executrix and reſiduary legatee, and ſubſtituted her in her mother's place,

place, *quoad* the liferent of his land-eſtate, though under ſuch burdens as renders that liferent of little or no value.

In the proceedings before the Lord Ordinary, the petitioner did not ſcruple to aver, that the Doctor being juſtly offended at the reſpondent's marriage, had, in reſentment thereof, deſtroved her bond of proviſion; and that though, by the interceſſion of friends, he had been ſo far reconciled as to give to her huſband a ſmall portion of 5000 merks, he continued his reſentment ſo far as not to renew her former bond of proviſion; and though he appointed her his executrix and reſiduary legatee, impoſed ſuch burdens upon the executry, as nearly exhauſted the ſame; that is, in other words, that the Doctor, under the ſhew and maſk of making a ſuitable proviſion for her, meant a mere mockery.

Nothing could be more injurious or falſe than this; calculated to give the Lord Ordinary an unfavourable impreſſion of the reſpondent, as if, by her undutiful behaviour to her uncle and benefactor, ſhe had forfeited his favour and good-will, and which was the more unpardonable, as it came from the mouth of ſo near a relation, who could not be ignorant of the falſity thereof.

That the reſpondent, from her earlieſt infancy, was, and to the day of her uncle's death continued to be his chief favourite, is a fact notorious to the whole relations. He took her into his family, when but young, to be a companion to him. When ſhe came of age, he gave her away in marriage to a gentleman, his moſt intimate friend and acquaintance. She was married in the Doctor's houſe, he himſelf perſonally preſent, acting the part of a parent to her, and was a party to the marriage-contract, which bears to be with his ſpecial advice and conſent; and from that day forward he lived in the ſtricteſt friendſhip with her and her huſband; of which there cannot be a ſtronger proof than the preference he gave to her beyond all his other relations in the ſame degree, when he appointed her his ſole executrix and reſiduary legatee.

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The only deeds neceſſary to be particularly ſtated for your Lordſhips judgment upon the point now in diſpute, are the diſpoſition or ſettlement of the land-eſtate, and that of the executry: for as to the various other deeds elicited from the Doctor towards the cloſe of his life, and which have been ſuſtained to affect the executry, it does not occur for what purpoſe notice is taken of them, if it is not to puzzle and perplex.

As an introduction to the argument hereafter to be uſed upon the import and effect of theſe particular deeds, the reſpondent will premiſe this obſervation reſpecting the general plan of the Doctor's ſettlements; *viz.* That as the Doctor, who lived and died a bachelor, had numerous relations in the degree of nephews and nieces, grand-nephews, and grand-nieces, and as his fortune was not ſuch as to impreſs him with the fooliſh idea of eſtabliſhing a family, or perpetual repreſentation, he judged much more rationally in the diſtribution he made amongſt his numerous relations, whereby all were to ſhare of his bounty in a greater or leſſer degree.

And ſo ſtanding the caſe, the argument ſo much inſiſted upon, of its not being preſumable that the Doctor could intend to burden his heir with this ſum of 6000 merks, when he had given the liferent of his lands firſt to his ſiſter, thereafter to the reſpondent his niece, muſt fly off. That he once charged that ſum as an expreſs burden upon the fee of theſe lands, is undeniable; which therefore throws the labouring oar upon the petitioner, to ſhow, by evidence equally clear and indiſputable, that the Doctor did thereafter transfer that burden from his heritage to his executry. For it is a principle in common ſenſe, as well as in law, That a ſettlement once deliberately made, and fairly executed, is not *in dubio* preſumed to be altered.

Such being the general plan of ſettlement or diſtribution which the Doctor had projected, he began with the land-eſtate, which he deſtined for his ſiſter in liferent, and his nephew, Profeſſor *Blackwell*, in fee. And as theſe lands, however low rented

rented by the then current tacks, made the bulk of his fortune, and for which it was currently reported he had been offered *L.* 2000 *Sterling*, he took under ſpecial conſideration what burdens he ſhould lay upon theſe; and the burdens he reſolved to impoſe were *L.* 200 *Sterling* to his niece *Chriſtian Blackwell*, and 6000 merks *Scots* to his grand-niece, *Chriſtian Hay*.

Accordingly, by deed of this date, he " gave, granted, and " diſponed to and in favours of his ſiſter *Chriſtian Johnſton*, " relict of Mr *Thomas Blackwell*, in liferent; and to *Thomas* " *Blackwell*, their eldeſt lawful ſon, his heirs, *&c.* heritably " and irredeemably in fee, *with and under the burdens and re-* " *ſervations under written*, his lands of *Grange*, and others " therein mentioned; and he thereby alſo diſponed and " made over to the ſaid *Thomas Blackwell*, his nephew, *under* " *the burdens, proviſions, and reſervations under written*, all other " lands, tenements, debts heritably ſecured by infeftment, ad- " judication, or other real ſecurity, and all other heritages " whatſoever, and, but prejudice of the foreſaid generality, " his intereſt in the three adjudications therein mentioned: " Providing always, as it is thereby provided and declared, " *That the ſaid Mr* Thomas Blackwell, *my nephew, and the ſub-* " *jects before diſponed to him* (but not the liferent in favours " of my ſaid ſiſter), *are and ſhall be burdened with the payment of* " *the ſum of L.* 200 Sterling *to* Chriſtian Blackwell *my niece*, " *and of* 6000 *merks* Scots *to* Chriſtian Hay *my grand-niece*, and " of the annualrents of ſaid two ſums and penalties if incurred, " in terms of two ſeveral bonds granted by me to them, of the " date of theſe preſents; and with the payment of what further " ſums I ſhall think fit, by a writing under my hand, to burden " the ſaid *Thomas Blackwell* my nephew, *and the ſubjects before* " *diſponed to him.*" And he thereby revokes all former ſettlements of his heritable eſtate, reſerves his liferent-uſe of the premiſes, and power to alter, innovate, *&c.* Nov. 23. 1747.

From this deed, of the tenor above mentioned, it is material to obſerve, in the firſt place, That it is not conceived in the form of a ſettlement of ſucceſſion to himſelf; and failing him by deceaſe, to ſuch and ſuch other perſons, which would have required a ſervice; but in the form of a direct and immediate diſpoſition to his ſiſter in liferent; and to her eldeſt ſon *Thomas Blackwell*, and his heirs, in fee; with a reſerved liferent, and power of alteration to himſelf; which faculty never being exerced, it was an effectual and ſubſiſting diſpoſition from its date.

2*dly*, That the diſpoſition of the fee not being perſonal to *Thomas Blackwell* the nephew, but to him and his heirs, it did not become vacated by *Thomas Blackwell*'s predeceaſing the Doctor, but accrued to *Thomas Blackwell*'s heirs as in his right, ſubject ſtill to the Doctor's power of alteration. But as no ſuch alteration was made, it is under that character only that the now petitioner has, or can have any right to theſe lands, not as heir to Doctor *Johnſton*, but as heir to his uncle the aforeſaid *Thomas Blackwell*, the diſponee. And that ſuch was Doctor *Johnſton*'s ſenſe of the matter, is apparent from this, That after the death of his nephew the diſponee, until the day of his own death, he preſerved that deed uncancelled, and never made any new ſettlement or diſpoſition of the fee of theſe lands; though upon the death of his ſiſter, to whom he had granted the liferent, he ſubſtituted the reſpondent in her place, with ſome additional burdens; which therefore is demonſtration, that as he meant this deed, ſo carefully preſerved, to be the ſubſiſting ſettlement of the fee of his lands, he never intended that the petitioner, or any other perſon who ſhould take the ſucceſſion under the character of heir to *Thomas Blackwell* the diſponee, ſhould have any further intereſt in theſe lands than the fee, burdened with the two ſums above mentioned of *L.* 200, and 6000 merks; though, as the Doctor did thereafter, during his own life, tranſact his intereſt in the three adjudications above mentioned, which the reſpondent has

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been informed turned to very little account, and applied the proceeds thereof in payment to *Chriſtian Blackwell* of her *L.* 200.; the lands were thereby relieved of that burden, and remained only ſubject to the 6000 merks, in favours of *Chriſtian Hay*, the Doctor's grand-neice, and which is the ſum now in diſpute.

3*dly*, Your Lordſhips will obſerve, that in ſo far as the aforeſaid diſpoſition burdens not only the diſponee perſonally, but the lands themſelves with theſe two particular debts, it differs materially from the common clauſe in deeds of ſettlement, whether of heritage or executry, obliging the heir or executor to pay all the teſtator's debts; which, whether expreſſed or not, is implied, but prejudice of the relief which the different heirs may be entitled to from one another. The burden impoſed by this deed is ſpecial, only of the two debts above mentioned: The diſpoſition is granted under the burdens therein after mentioned, and no otherwiſe; and he thereby, not only obliges the diſponee and his heirs to pay theſe two ſums, but declares the ſubjects diſponed to be therewith burdened.

Matters continued upon this footing till the year 1757, when *Chriſtian Johnſton* the liferentrix, and *Thomas Blackwell* the fiar, being both dead, the Doctor reſolved to complete the intended ſettlement and diſtribution of his whole fortune, heritable and moveable, and to ſubſtitute the reſpondent in her mother's place, as to the liferent of the aforeſaid lands, with ſome additional burdens. He had already ſettled the lands themſelves in the manner he propoſed they ſhould ſtill go, under the burdens impoſed upon them, *viz.* in favours of the petitioner, *qua* heir to his uncle the aforeſaid *Thomas Blackwell*; ſo that, in as far as reſpected the fee of theſe, he had no occaſion to make a new ſettlement; and as the whole reſidue of his fortune conſiſted of his executry or perſonal eſtate, that was the principal object of the additional ſettlement he then intended.

Accordingly,

March 8. 1757. Accordingly, by deed of this date, the Doctor, then in *Edinburgh*, and when in the full enjoyment of all his rational faculties, gave, granted, and diſponed to the reſpondent his niece, the liferent of the aforeſaid lands formerly provided to her mother; and he thereby alſo aſſigned and diſponed to her, his whole moveable goods, gear, and effects, and all and ſundry debts and ſums of money, heritable as well as moveable, that ſhould be reſting and pertaining to him at his death, burdened with the payment of certain annuities; whereby her liferent of the lands is in a great meaſure exhauſted, ſo long as theſe annuitants live, whoſe lives are fully as good as the reſpondent's own, which renders her liferent of the lands little better than nominal; and her right to the executry or perſonal eſtate, is burdened with ſundry legacies, and in general with the payment of all the Doctor's juſt debts, and performance of all his deeds, whether gratuitous or onerous.

This laſt, your Lordſhips know well, is a clauſe of mere ſtyle, which in ſettlements of ſucceſſion is implied, whether expreſſed or not, but prejudice of the relief competent to one heir or diſponee againſt another.

Though by this deed the Doctor did nominally convey to the reſpondent, not only all perſonal, but even heritable debts that might be owing to him at his death; it is certain fact, and not diſputed, that the Doctor, neither then, nor at his death, had any debt whatever owing to him by heritable ſecurity; ſo that theſe were mere words of ſtyle, however demonſtrative of the Doctor's favourable intentions towards the reſpondent.

As by theſe two deeds, of the tenor above mentioned, the Doctor had diſpoſed of his whole eſtate, heritable and moveable, the queſtion thereupon ariſing is, Whether the 6000 merks to *Chriſtian Hay* is to remain a burden upon the lands, and conſequently upon the petitioner, who takes the lands under that very diſpoſition, which impoſed the burden, and gave it a real lien upon the lands themſelves; or, if it is to

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be made good by the reſpondent out of the executry, ſo far as as that will go?

It is a principle of law, *Quod generi per ſpeciem derogatur.* If one makes a ſpecial bequeath of a particular ſubject to A, and thereafter makes a general bequeath to B, without expreſsly revoking the former ſpecial bequeath, it is a clear caſe that the general implies no revocation of the ſpecial. And by the ſame rule, where a ſpecial burden is impoſed upon a particular ſubject, or a particular heir, a general diſpoſition in favours of another perſon with the burden of debts in general, will neither be underſtood to revoke the former ſpecial diſpoſition, nor to relieve that ſpecial ſubject or perſon from the ſpecial burden with which that perſon or right was formerly burdened.

The application of this rule to the caſe in hand is obvious. The Doctor, by the diſpoſition of his lands to his ſiſter in liferent, and to her ſon *Thomas Blackwell* in fee, did not only take the ſaid *Thomas Blackwell* and his heirs perſonally bound to pay this particular bequeath of 6000 merks to *Chriſtian Hay*, but did, *in terminis*, declare the lands themſelves to be therewith burdened; and as he thereby gave it a real lien as againſt the diſponee, it is, with ſubmiſſion, impoſſible to preſume that by the after-ſettlement of his perſonal eſtate in favours of the reſpondent, with the ſpecial burdens therein contained, and the general clauſe, ſubjecting her perſonally to the payment of all his debts, and performances of all his deeds, the Doctor could intend, or that it ſhould have the effect, to tranſfer upon her the 6000 merks, which by the ſettlement of the land-eſtate he had ſo expreſsly impoſed upon the lands themſelves. More eſpecially conſidering, that, by that very deed, he ſettled upon her, as in place of her mother, the liferent of theſe very lands, with the burden of certain annuities payable forth thereof; and ſubjected her to the payment of ſundry legacies to others of his relations: ſo that if it had been intended to burden her alſo with the 6000 merks to *Chriſtian Hay*, it is inconceivable that the ſame ſhould not have been

expreſsly mentioned as well as the others; as it cannot be ſuppoſed, that the Doctor had either overlooked or forgot this ſpecial bequeath to his niece the ſaid *Chriſtian Hay*.

The reſpondent therefore reſts her claim to be relieved of this 6000 merks out of the heritable eſtate, upon this plain and ſimple ground, That, by the diſpoſition of theſe lands, the Doctor not only took the diſponee and his heirs perſonally bound to pay that ſum, but declared it to be a burden upon the lands themſelves: That the Doctor never recalled that diſpoſition, nor made any new ſettlement of the lands: That the general clauſe in the after ſettlement of the executry, neither imports, nor was intended to transfer that particular ſum from the diſponee to the executor; and therefore, that it muſt ſtill remain a burden upon the lands: and if the petitioner does not think that they are worthy of his acceptance with that burden, he is at liberty to repudiate the ſame. There is no place for a *quæſtio voluntatis*, where the Doctor has declared his will in this particular in ſuch expreſs terms; though if there were *termini habiles* for ſuch a queſtion, ſhe ſubmits it to your Lordſhips, that the Doctor's intention was clear and manifeſt to continue this a burden upon the diſponee to the lands.

And though the reſpondent is hopeful to have thus in a great meaſure obviated all that is material in this reclaiming petition; yet, as the general point therein pleaded is endeavoured to be maintained by ſundry very ingenious arguments, the reſpondent will proceed to conſider theſe in their order.

It is contended, in the *firſt* place, That though the diſpoſition 1747 was retained by the Doctor till his death, uncancelled or unaltered; yet as both the liferenter and fiar predeceaſed the Doctor, whereby the chief end and purpoſe of that deed is ſaid to have failed, it ought to be preſumed, that the Doctor did not intend that it ſhould continue to be the title under which the lands were to be taken; more eſpecially, conſidering that, by the deed 1757, he granted the liferent of theſe very lands to the

the reſpondent, with the burden of certain annuities payable to third parties.

That the eventual liferent which the Doctor had granted by the deed 1747 to his ſiſter, did drop by her predeceaſe, is undeniably true; but that the diſpoſition of fee became evacuated by the death of *Thomas Blackwell*, the diſponee, cannot ſo eaſily be admitted. That deed, ſo far as reſpected the fee of theſe lands, was not conceived in the form of a ſettlement or ſucceſſion, nor was it perſonal to *Thomas Blackwell* himſelf; but was granted in the form of a direct conveyance to him, and to his heirs, with a reſerved power to the Doctor to alter the ſame at pleaſure. This power or faculty the Doctor never exerced, though he ſurvived *Thomas Blackwell* ſeveral years, nor made any new ſettlement of theſe lands; ſo that his retaining the ſame unaltered or uncancelled till the day of his own death, without making any new diſpoſition or ſettlement thereof, is the ſtrongeſt proof of the Doctor's intention that that diſpoſition was to remain effectual in favours of the petitioner, as the heir of *Thomas Blackwell* the diſponee, in the ſame terms, and with the ſame burdens as granted in favours of *Thomas Blackwell* himſelf; and the after-grant of the liferent of theſe lands in favour of the reſpondent, upon the death of the former liferentrix, the Doctor's ſiſter, is real evidence, that the Doctor had not forgot the former ſettlement of theſe lands by the deed 1747, when he ſubſtituted the reſpondent in place of his ſiſter, then deceaſed, in the liferent of theſe lands; and as he made no ſuch alteration *quoad* the fee, the law muſt preſume that he intended that deed in ſo far to remain effectual.

The petitioner obſerves, in the *ſecond* place, that as the deed 1747 did contain a diſpoſition not only of the aforeſaid lands, but alſo of all other heritages pertaining to the Doctor, particularly of his intereſt in the three adjudications above mentioned; it is reaſonable to ſuppoſe that the Doctor intended theſe ſeparate ſubjects for payment and relief of the

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debts with which the lands were burdened; and therefore that, as the Doctor did thereafter tranſact the ſums due upon the aforeſaid adjudications, or otherwiſe diſpoſed of the ſame, and that, by the deed 1757, he made over to the reſpondent what heritable debts might be owing to him at his death, it ſhould upon this ground alſo be preſumed, that the Doctor intended to relieve his lands of the 6000 merks to *Chriſtian Hay*.

The reſpondent, for anſwer, ſays, That as the diſponee, by the deed 1747, was taken expreſsly bound to pay that ſum, and the eſtate thereby diſponed, burdened therewith, every ſubject granted by that diſpoſition was made liable to the payment of that ſum. If the Doctor, in his own life, had diſpoſed of one parcel of the lands, the other two parcels would ſtill have remained ſubject to the burden. *Unaquæque gleba ſervit*. The burden was not impoſed upon this or the other particular ſubject, but upon the whole ſubjects thereby diſponed. That diſpoſition remains a ſubſiſting deed to this day, and the only title by which thoſe lands can be taken. The Doctor has not, by any after deed, relieved the lands of that burden, which therefore muſt remain ſubject thereto.

The petitioner ſays, in the *third* place, that it is unreaſonable to ſuppoſe the Doctor could mean to burden his diſponee with the payment of this ſum, when he had no fund out of which to pay it, during the ſubſiſtence of the liferent, as the Doctor himſelf had uplifted the ſums due upon the adjudications, which, at the time that burden was impoſed, muſt have been in the Doctor's view, as the fund out of which this ſum was to be paid.

The reſpondent has already ſaid, that the aforeſaid adjudications were mere clampers upon bankrupt eſtates, which the Doctor knew well would eventually turn to little account, and therefore tranſacted them in his own lifetime, upon very eaſy terms, and applied the proceeds thereof in payment of the *L.* 200 with which the lands were burdened, in favours of

Chriſtian

Chriſtian Blackwell, another of his nieces; when, by the diſpoſition 1747, he granted the liferent of theſe lands to his ſiſter, and the fee thereof to her ſon *Thomas Blackwell*, burdened with the payment of *L.* 200 to *Chriſtian Blackwell*, and of the 6000 merks to *Chriſtian Hay*; he took care ſpecially to provide, that theſe two ſums ſhould be a burden upon the fee, not upon the liferent. In the diſtribtion he intended to make of his effects, he conſidered theſe two ſums to be a rational burden upon the fee of theſe his heritable ſubjects, knowing full well, that the perſons to take under that diſpoſition of fee would be under no difficulty, either out of their ſeparate funds, or by granting heritable ſecurity upon the lands themſelves, to raiſe what was ſufficient to pay theſe two ſums. This muſt have been the caſe, had his ſiſter and *Thomas Blackwell* ſurvived him. If *Thomas Blackwell* ſhould not chuſe to accept of the diſpoſition under that burden, he was at liberty to repudiate the ſame; and as the lands tranſmit to the petitioner, under the ſame deed, and under the ſame burdens, as heir to *Thomas Blackwell*, the ſame liberty is competent to him. If he does not judge the lands to be worthy of acceptance, under theſe burdens, eſpecially now that he is relieved of the *L.* 200 to *Chriſtian Blackwell*, he may abſtain therefrom; but he muſt either take it as granted, or repudiate it altogether.

The petitioner contends, in the *fourth* place, that ſuppoſing the diſpoſition 1747 to be a ſubſiſting deed, and that the Doctor intended to continue this 6000 merks as a burden upon the lands, it was competent for him, the petitioner, to repudiate the ſame, and to take the lands in the character of heir: That he has accordingly made up his titles by ſpecial ſervice, as heir to the Doctor: And therefore, as he does not take the lands under the deed 1747, he is not bound to acknowledge the burdens impoſed by that deed.

This attempt to elude the Doctor's ſettlement, will not meet with your Lordſhips approbation; nor can the law give countenance to it. It has been already obſerved, that the deed

1747 is not conceived in the form of a ſettlement of ſucceſſion, but as a direct conveyance in favours of *Thomas Blackwell*, which, therefore, did veſt the perſonal right in him, though ſubject to an after defeaſance, if the Doctor had ſo intended: but as the Doctor made no after alteration, theſe lands remained *in hæreditate jacente* of *Thomas Blackwell*; and being diſponed to him and his heirs, muſt be taken by ſervice as heir to him.

Had this queſtion occurred with *Thomas Blackwell* himſelf, it is impoſſible, upon any known principle of law or juſtice, that the diſponee, by repudiating the diſpoſition, and taking the eſtate under the character of heir, can ſhake himſelf free of the burdens impoſed upon him by the diſpoſition. This was the expreſs doctrine of the civil law, *per l.* 2. *Cod. lib.* 6. *tit.* 39. where the rule is thus laid down: *Eum qui cum teſtamento poſſit obtinere hæreditatem, ab inteſtato jus ſuæ ſucceſſionis voluit amplecti, libertatibus eodem teſtamento datis obeſſe non poſſe, jampridem placuit.——Si vero jure facto teſtamento, ceſſante herede ſcripto, alter ab inteſtato adiit hæreditatem, neque libertates, neque legata ex teſtamento poſſint præſtari, manifeſtum eſt.*

Here the diſtinction is laid down between the two caſes, where the double character of *hæres ſcriptus*, and *hæres ab inteſtato*, unite in the ſame perſon; and where theſe characters belong to different perſons. In the firſt of theſe, juſtice will not permit the *hæres ſcriptus* to avoid the burdens or legacies, by repudiating the will, and claiming *ab inteſtato*; but under whichever of theſe characters he takes the eſtate, the law obliges him to make good the legacies: whereas, in the other caſe, when, by the repudiation of the *hæres ſcriptus*, the eſtate goes to a different perſon, the *hæres ab inteſtato*, as the teſtament was, by ſuch repudiation, totally evacuated, the heir *ab inteſtato* was not bound to make good the legacies.

But the ſeverity of the ancient law in this particular, was thereafter amended by *Novel* 1. *cap.* 1. & 2. which ſtatuted, that the heir *ab inteſtato*, ſucceeding by the repudiation of the

hæres

hæres ſcriptus, ſhould be bound to make good the legacies, *ex præſumpta voluntate teſtatoris*. And moſt lawyers, of the greateſt character, ſuch as *Voet*, *lib.* 28. *tit.* 3. § 14. *Sande deciſ. Friſ. lib.* 4. *defin.* 10. *Lewen cenſ. for. part.* 1. *lib.* 3. N° 2. have approved of this amendment of the law, and certified it to be agreeable to the modern practice of nations.

And ſo this point was expreſsly judged in the caſe of *Keith Turnbull* contra *Andrew Kinnier*, 29th *December* 1711, obſerved by Lord *Fountainhall*, where, in a caſe preciſely ſimilar, the Lords found, " That *Andrew Kennier*, the diſponee, " might totally abſtain; but, that if he meddled with the " heritage, he could not repudiate the burdens laid on it by " the proprietor."

The petitioner ſays, in the *laſt* place, That as Doctor *Johnſton*, by the deed 1757, burdened the reſpondent, *qua* liferentrix, with an annuity of *L.* 20 to *Janet Blackwell*, and took his heirs and ſucceſſors in the aforeſaid lands bound to pay that annuity after the reſpondent's death, his omitting to burden his heir with the 6000 merks to *Chriſtian Hay*, when he burdened him with the annuity to *Janet Blackwell*, ought to preſume, that the Doctor did not intend to impoſe any ſuch burden on him.

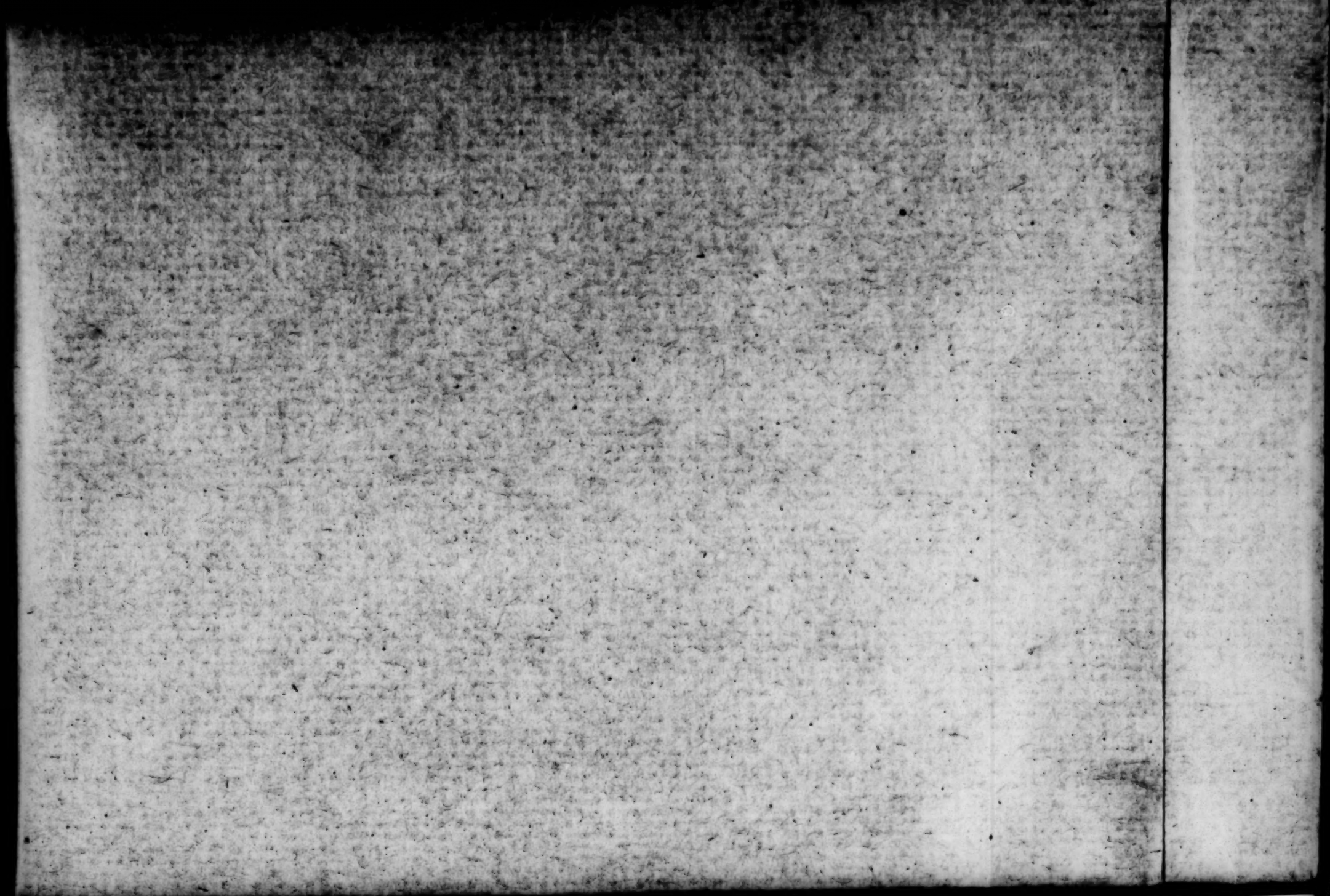
The reſpondent might argue, with at leaſt equal reaſon, that Doctor *Johnſton* having burdened her with the annuity of *L.* 20 to *Janet Blackwell*, and not having burdened her with the 6000 merks to *Chriſtian Hay*, it ſhould be preſumed that he did not mean to impoſe that burden on her. But the truth is, that both preſumptions are equally groundleſs. The Doctor had already laid the 6000 merks as an incumbrance upon his lands; and therefore, however neceſſary it was, in the burdens afterwards created, to aſcertain by whom, or out of what ſubjects theſe ſhould be paid, he had no occaſion to make any ſuch declaration with regard to burdens already ſettled.

It is an agreed point, that this 6000 merks was, by the deed 1747, made a burden, both upon the diſponee and his heirs

heirs perſonally, and upon the ſubjects thereby diſponed really. The Doctor has by no after deed relieved them of that burden; ſo that the whole diſpute reſolves into this ſingle queſtion, Whether the general clauſe in the deed 1757, ſubjecting the reſpondent to the payment of the Doctor's debts, and performance of his deeds, does either *vi legis*, or *ex præſumpta voluntate* of the Doctor, transfer upon the reſpondent the burden of this 6000 merks, which, by the deed 1747, was ſo expreſsly laid upon the diſponee and the lands themſelves, ſuppoſing that deed to be ſtill ſubſiſting and effectual? The Lord Ordinary has repeatedly found, that it has no ſuch effect; and it is hoped your Lordſhips will be of the ſame opinion.

In reſpect whereof, &c.

ALEX. LOCKHART.



State of the Funds of Dr *Johnſton*'s Executry, and
into Capitals at th

THE EXECUTRY FUNDS Dr

		Sterling. L.	s.	d.	
To the balance of the executry-funds, conform to the account in proceſs		1149	3	$8\frac{3}{12}$	Novem
From which deduct an overcharge of intereſt on *Ker*'s bond, allowed by an interlocutor of the Lord Ordinary	26 0 0				March
Alſo deduct an error in ſumming the debit-ſide of the executry-account formerly exhibited	60 0 0				
		86	0	0	
		L 1063	3	$8\frac{3}{12}$	
To balance, wherein the executry-funds are over-exhauſted		250	5	$10\frac{5}{12}$	
		L. 1313	9	$6\frac{2}{3}$	

and of the Burdens thereon, converting the Annuities
the ordinary Rates.

Contra Cr

		Sterling. L.	s.	d.
November 23. 1747.	By bond of proviſion to *Chriſtian Hay* for 6000 merks, or	333	6	8
March 8. 1757.	By diſpoſition to *Helen Blackwell*, ſhe is burdened with payment to the ſurvivor of *John White* and his ſpouſe	10	0	0
	By ſame deed ſhe is burdened with payment to Mrs *Hay* of an annuity of *L.* 20 *Sterling* yearly, at ten years, is	200	0	0
	By a deed the Doctor obliges him to pay to *Donald Govan*, an annuity of *L.* 5 to him and his ſpouſe, and longeſt liver of them, at 15 years, being a double liferent	75	0	0
	By ſame deed he obliges him to pay into *John Buchanan*'s hands, for their uſe	50	0	0
	By bond of proviſion to *Chriſtian Blackwell*, Mrs *French*, for 5000 merks, *inde*	277	15	$6\frac{2}{3}$
	Beſides 3000 merks in her contract of marriage, now paid, with intereſt from the day of the Doctor's death	185	10	0
	By bonds to *Eliſabeth Taylor* for	50	0	0
	By obligation to pay her yearly *L.* 5, afterwards raiſed to *L.* 6, at ten years, is	60	0	0
	By ſum paid to *George Baird* and Co. *per* decreet, over and above the funeral charges taken credit for	9	17	4
	By ſum of the expences of the cognition *per* decreet	2	0	0
	By the expences of Mrs *Blair*'s mournings, and of other two in the Doctor's family, at his death; and of expences of proceſs diſburſed by her after the period of the account produced, and ſome public burdens on the land, at the Doctor's death, not formerly ſtated	60	0	0
	L.	1313	9	$6\frac{2}{3}$